Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1173

TRINITY TRUCKING & MATERIALS CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Trinity Trucking & Materials Corp. (the "Company") respectfully prays that a writ of certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Seventh Circuit (the "Circuit Court") enforcing the Order of the National Labor Relations Board (the "Board") against the Company.

Opinions Below

The opinion and award of the Arbitrator is not reported; the opinion and award is attached hereto, Appendix B,

pp. A2-A13[1]. The Decision of the Board denying the Company's motion for summary judgment is reported at 221 NLRB 364 and is attached hereto, Appendix C, pp. A14-A22. The Decision of the Administrative Law Judge (the "ALJ") is attached hereto, Appendix D, pp. A23-A44. The Supplemental Decision and Order of the Board adopting the ALJ's Decision is reported at 227 NLRB No. 121 and is attached hereto, Appendix E, pp. A45, A46. The Order of the Circuit Court is unpublished per its circuit rule 35; the Order is attached hereto, Appendix F, pp. A47-A52. The Order of the Circuit Court denying the Company's petition for rehearing en banc is attached hereto, Appendix G, pp. A53, A54. The Order of the Circuit Court denying the Company's motion to stay execution of the Board's Order is attached hereto, Appendix H, p. A55. The application to the Supreme Court of the United States for a stay of mandate of the Circuit Court was denied by Justice Stevens on December 28, 1977. The Judgment of the Circuit Court entered against the Company is attached hereto, Appendix I, p. A56.

Jurisdiction

The date of the Order to be reviewed is November 3, 1977. On November 30, 1977, the Circuit Court denied the Company's timely petition for rehearing en banc and modified its original Order. This petition for certiorari was timely filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under 29 U.S.C. §160(e), as amended.

1. "A" refers to pages of the Appendix to this Petition. "Tr." refers to pages of the stenographic transcript of the hearing before the Administrative Law Judge. "GCX", "RX" and "CPX" refer to exhibits introduced at the hearing by the Counsel for the General Counsel of the Board, the Company (the Respondent at the hearing), and the Charging Parties, respectively.

Questions Presented

1. Whether three (3) employees can refuse to follow the contract grievance procedure and instead initiate a civil action in state court for back wages against the Company and its primary customer.
2. Whether a punitive damage demand, which was part of a civil action in state court for back wages, constitutes disloyalty and does not afford employees protection under Section 7 of the National Labor Relations Act (the "Act").
3. Whether the reliance on the advice of an attorney to file a civil action in state court with a punitive damage demand affords employees protection under Section 7 of the Act.

Federal Statutes Involved

The pertinent parts of the Act (29 U.S.C. §151, et. seq.), are set forth in Appendix A, p. A1.

Statement of the Case

The Company and Teamsters Local Union No. 144, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union"), were parties to a collective bargaining agreement (the "Agreement"), entered into on February 1, 1974, and expiring on June 31, 1977. This Agreement covered the Company's truck drivers. The Company was not a party to any other agreement with any union. The Company's primary customer, Wabash Valley Asphalt Co., Inc. ("Wabash"), was engaged in the construction of state highways, parking lots, airfields and roads. Wabash was signatory to a collective bargaining agreement between the Indiana Highway Constructors, Inc. and the Indiana Conference of Teamsters. (A26, A27)

Among others, the Company employed employees Joy, Simmons and Gibbens (the "Charging Parties") as truck

drivers. The Charging Parties were covered by the Agreement in effect between the Company and the Union and were aware that the Agreement contained a grievance procedure for the resolution of labor disputes between the employees, the Union and the Company concerning the meaning or application of the provisions of the Agreement. (A26-A28; Tr. 187, 1. 16-24; Tr. 210, 1. 8-14; Tr. 232, 1. 9-14; GCX No. 3)

One of the Charging Parties, Lloyd Joy, had contended for some time that the Company was required to pay the wage rates specified in the collective bargaining agreement that existed between Wabash and the Indiana Conference of Teamsters on all work. (A28, A29) The Company took the position that it was not required to do this inasmuch as the Company was not signatory to that agreement. (A29) The Company orally agreed to pay these higher wages on federally funded construction jobs such as highway and airport jobs. (A28; Tr. 127, 1. 16-25; Tr. 128, 1. 1-14)

Joy, on two (2) separate occasions filed grievances over the Company's failure to pay the higher wages when he was delivering asphalt to a federally funded job and these two (2) grievances were granted. (A29)

However, on June 28, 1974, the Charging Parties, based upon the advice of their attorney, filed a three count civil lawsuit in Vigo County, Indiana, Superior Court against the Company, Wabash and others. The theory of the lawsuit was one of breach of contract for failing to pay the higher wages pursuant to the agreement between Wabash and Indiana Conference of Teamsters. Collectively, the Charging Parties sought Forty Thousand Dollars ($40,000.00) in compensatory damages for back wages and an additional Two Hundred Thousand Dollars ($200,000.00) because of the Company's alleged failure to

> "pay wages and rental earned by [the Charging Parties] has been intentional, malicious, oppressive, and in the heedless disregard of the rights of the [Charging Parties]." (A29; CPX No. 1)

The Company first learned of the lawsuit when one of the officials of the Company heard a local radio broadcast on June 29, 1974. (Tr. 323, 1. 24-25; Tr. 324, 1. 1-3) Additionally, the lawsuit was reported in both the local morning and evening newspapers. (Tr. 254, 1. 10-25; Tr. 255, 1. 1-20; RX No. 1)

Upon learning of the lawsuit the official contacted the General Manager of Wabash. The General Manager of Wabash had also heard the same radio broadcast, (Tr. 253, 1. 19-22) and he was upset about the lawsuit. (Tr. 256, 1. 6-24; Tr. 328, 1. 2-19) Until this time the relationship between Wabash and the Company had been cordial and friendly but deteriorated following the filing of the lawsuit. (Tr. 253, 1. 3-5; Tr. 326, 1. 21-25; Tr. 327, 1. 1-6; RX No. 2)

The Company officials immediately got together to determine the effect of the lawsuit and the punitive damage demands included in it. (A29, A30)

On July 3, 1974, the President of the Company wrote each of the Charging Parties a letter demanding that the punitive damage portion of the lawsuit be withdrawn; that if the punitive portion of the lawsuit was successful it could financially destroy the Company; and, that this approach went beyond the customary method of resolving wage claims. The letter further stated that the Charging Parties' actions constituted extreme disloyalty and their failure to withdraw the punitive damage portion within forty-eight (48) hours would result in their discharge. These letters were hand-delivered to each of the Charging Parties on the same day. (A30, A31)

On July 5, 1974, after the forty-eight (48) hour period had expired, an official of the Company personally talked with each one of the Charging Parties to see if they had withdrawn the punitive damage portion of the lawsuit. None of them had. The Charging Parties were then discharged. (A3; A31, A32) A letter was subsequently sent to each of the Charging Parties confirming their discharges. (GCX Nos. 8, 9, 10)

Each of the Charging Parties immediately filed three (3) grievances: one protesting their verbal threat of discharge; one protesting their verbal discharge; and, one protesting their written discharge. (A2-A4) One of the Charging Parties, Joy, also filed an unfair labor practice charge with Region Twenty-five of the Board. The charge alleged that the Company and Wabash violated Sections 8(a)(1) and 8(a)(3) of the Act when they were discharged on July 5, 1974. (A14)

The grievances filed by the Charging Parties protesting their discharges were heard by an impartial arbitrator on September 11, 1974, pursuant to the Agreement between the Company and the Union. (A2) The Board deferred action on the unfair labor practice charge pending issuance of the arbitrator's opinion and award. (A14, A15)

On November 19, 1974, the arbitrator issued his award which denied the grievances and found that the initiation of a punitive damage claim against the Company and its best customer constituted disloyalty and supplied adequate cause for discharge. The arbitrator further determined that this disloyal activity was not protected concerted activity within the meaning of Section 7 of the Act. (A2-A13)

On February 27, 1975, the Regional Director for Region Twenty-five of the Board issued a complaint against the Company alleging that the discharges of the Charging Parties violated Sections 8(a)(1) and 8(a)(3) of the Act.

(A15) Since the Company believed that the arbitrator's opinion and award had already resolved the case, the Company filed a Motion for Summary Judgment with the Board in Washington, D.C. on March 17, 1975. (A15) On November 5, 1975, the Board denied the Motion and ordered that a hearing be held before an ALJ. (A21, A22)

A hearing was held on February 24, 25 and 26, 1976. (A24) On May 28, 1976, the ALJ concluded the Company had violated Section 8(a)(1) of the Act when it discharged the Charging Parties, and that the activity of filing the punitive damage portion of the civil law suit was concerted protected activity under Section 7 of the Act. (A39, A40) On January 7, 1977, the Board issued its Supplemental Decision and Order adopting the findings, conclusions and recommended order of the ALJ. (A45, A46)

On February 22, 1977, the Board applied to the Circuit Court for enforcement of its Supplemental Order. On November 3, 1977, the Circuit Court granted enforcement. (A47-A52) On November 30, 1977, the Circuit Court denied the Company's Petition for Rehearing En Banc but modified its November 3, 1977, Order. (A53, A54) On December 14, 1977, the Circuit Court denied the Company's Motion to Stay Execution of an Order of the Board. (A55) On December 28, 1977, Justice Stevens of this Court denied the Company's Application for Stay of Mandate of the Circuit Court. On January 17, 1978, the Circuit Court issued its Judgment against the Company. (A56)

Reasons For Granting The Writ

I. THE CIRCUIT COURT'S ORDER CONTRAVENES THE RULINGS OF THIS COURT THAT EMPLOYEES MUST EXHAUST THE CONTRACT GRIEVANCE PROCEDURE BEFORE INITIATING A CIVIL LAWSUIT FOR BREACH OF CONTRACT.

The Circuit Court completely ignored the holding announced by this Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) which provides that the federal labor policy requires that individual employees wishing to assert contract grievances must first attempt to use the contract grievance procedure agreed upon between an employer and a union.

And, this Court recently reaffirmed its position that a contract grievance procedure is still mandatory for certain issues raised under a collective bargaining agreement even though the day-to-day labor-management relationship has ceased between the company and the union and the contract between the company and union had expired.[2]

On the other hand, the Circuit Court relies upon *Vaca v. Sipes*, 386 U.S. 171, 185 (1967) and *Orphan v. Furnco Construction Corp.*, 466 F.2d 795, 803 (7th Cir. 1972) as justification for the Charging Parties' failure to use a viable contract grievance procedure.

Vaca, supra, merely reaffirmed this Court's position in the exclusive use of the contract grievance procedure unless the parties were unwilling to invoke the procedure. And, in *Orphan, supra*, the Circuit Court concluded that employees could file a civil suit for damages even though a contract grievance procedure existed because the employees' attempts to use the contract grievance procedure had been frustrated by the union.

However, none of the situations raised in *Vaca, supra*, or *Orphan, supra*, exist in the instant case. Prior to their discharges, one of the Charging Parties had never attempted to use the contract grievance procedure for any reason; one had used the contract grievance procedure

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2. *Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers Union, AFL-CIO*, ___ U.S. ___, 97 S.Ct. 1067 (U.S. March 7, 1977).

once, but not involving a wage claim; and the other Charging Party, Joy, had used the contract grievance procedure many times for a variety of complaints with favorable results—the last two (2) out of three (3) times successfully for wage claims under the agreement between Wabash and the Indiana Conference of Teamsters, which pre-dated the initiation of a civil lawsuit for breach of contract (back wage claims) by six (6) weeks and four (4) weeks respectively. These facts hardly support the Circuit Court's reasoning for its reliance on *Vaca, supra*, and *Orphan, supra*. Yet, this Court has required a "tainting" of the contract grievance procedure before sanctioning employees to proceed outside the contract grievance procedure.[3]

If the Order and Judgment of the Circuit Court is affirmed in this case, then the frustration that will occur will be severalfold: the federal labor policy on the use of the contract grievance procedure will be frustrated; the federal labor policy of the voluntary settlement of disputes arising under a collective bargaining agreement will be frustrated; the collective bargaining process itself will be frustrated because neither an employer nor a union will know whether the collective bargaining agreement is binding upon the parties, its employees and members; and, the two (2) exceptions carved out of *Maddox, supra*, could result in chaos in the area of labor-management relations which has been relatively stable because of the pronouncements of this Court.

The Circuit Court has failed to follow the standards established by Congress,[4] and the enunciations of those

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3. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969).

4. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. §173(d)

standards by this Court in its decisions. However, other circuit courts have rendered decisions in accordance with this Court's decisions.[5]

A writ of certiorari should issue because of the Circuit Court's failure to follow this Court's decisions and because the Circuit Court's Order is in apparent conflict with the decisions of other circuit courts.

II. THE CIRCUIT COURT IS IN CONFLICT WITH THIS COURT'S RULING THAT DISLOYAL CONDUCT SUPPLIES ADEQUATE CAUSE FOR DISCHARGE, AND IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Circuit Court determined that the filing of a state court civil action for breach of contract based upon alleged back wages due them and a punitive damage claim for five (5) times the amount of the back wages by the Charging Parties was not in and of itself bad faith and relied upon *Leviton Manufacturing Company, Inc. v. NLRB*, 486 F.2d 686 (1st Cir. 1973). The Circuit Court further reasoned that since the activity of the Charging Parties was not bad faith, then they fell within the protection of Section 7 of the Act.

Evidently, the "bad faith" test set forth in *Leviton, supra*, has been adopted by one other circuit court.[6] And, in its opinion of November 5, 1975,[7] the Board gave first

5. *Beriault v. Local 40, Super Cargoes & Checkers of the International Longshoremen's & Warehousemen's Union*, 501 F.2d 258 (9th Cir. 1974); *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167 (5th Cir. 1971)

6. *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295 (5th Cir. 1976)

7. 221 NLRB 364

notice that it would rely on the bad faith test set forth in *Leviton, supra*.

Of course there is no standard or test set forth in either *Leviton, supra*, or *Altex, supra*, at footnote 6. In *Leviton, supra*, bad faith was found to exist by the circuit court because fourteen (14) grievances and complaints had been filed against the employer and the union. In *Altex, supra*, at footnote 6, a finding of no bad faith was made even though false affidavits were given by two (2) employees who had also been involved in certain activity which violated provisions of a collective bargaining agreement.

Therefore, from these two (2) cases it appears that an accumulation of acts, no matter how insignificant, is essential for a finding of bad faith, not the act itself. Certainly, this approach is not recommended in jurisprudence.

The facts of *Leviton, supra*, and *Altex, supra*, at footnote 6, are entirely different from the uncontradicted facts in the instant case. In each of these cases, the acts of the employees were directed *only* toward their employer or their employer and their union. And, the circuit courts in these two (2) cases did not address the issue of whether the employees' conduct was disloyal to their employers.

On the other hand, the first trier of fact in the instant case[8] and other circuit courts have used the "disloyalty" test to determine whether the acts of employees fell outside the protection of the Act.[9]

The facts in the instant case more closely follow the facts of *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953); *Boeing, supra*, at footnote 9; *Red Top, supra*, at footnote 9;

8. Arbitrator, Patrick J. Fisher, Appendix B(A2-A13)

9. *NLRB v. Knuth Brothers, Inc.*, 537 F.2d 950 (7th Cir. 1976); *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1971); *Boeing Airplane Company v. NLRB*, 238 F.2d 188 (9th Cir. 1956)

and, *Knuth Brothers, supra*, at footnote 9. In all of these cases, the employees either involved their employer's best customer or impugned the integrity of their employer. And, disloyalty was the determining touchstone in each of them.

This Court and various circuit courts have held to the proposition that

> "there is no more elemental cause for discharge of an employee than disloyalty to his employer. . . ."[10]

Certainly the filing of a civil action is protected activity under Section 7 of the Act. However, a punitive damage demand in excess of the Company's net worth and the joinder of the Company's primary customer along with the resulting publicity given to the lawsuit by the news media smacks of disloyalty. These facts coupled with credited statements of certain witnesses that Joy would close down the Company certainly show disloyalty.

The first trier of fact found disloyalty on the part of the Charging Parties. He observed them and made his credibility findings upon sworn testimony and a certified transcript.

A writ of certiorari should issue because this case presents the Court with the novel opportunity to determine the extent of the Act's protection of employee conduct which places the employer in a hopeless position: of choosing whether to discharge employees for engaging in conduct which destroys the employer's business interests and reputation, or whether to do nothing and allow such conduct to financially destroy the employer, and burden the financial integrity of its loyal employees.

Also, a writ of certiorari should issue because there is a conflict between the circuit courts and between the circuit courts and this Court as to the standard to be used in determining whether the activities of employees are protected under Section 7 of the Act.

10. *NLRB v. Local 1229, IBEW, supra*, at 472

III. THE CIRCUIT COURT DID NOT CONSIDER THE IMPORTANT QUESTION OF PUBLIC POLICY OF WHETHER RELIANCE ON THE ADVICE OF COUNSEL ABSOLVES EMPLOYEES FROM THE OBLIGATIONS IMPOSED BY FEDERAL LABOR LAW FOR ENGAGING IN UNPROTECTED ACTIVITY.

The Circuit Court did not address itself to the important question of whether the Charging Parties' reliance on the advice of counsel to file a civil suit in state court claiming both compensatory and punitive damages for back wages under a collective bargaining agreement to which the Company was not a party, cloaks the Charging Parties with the mantle of protection of Section 7 of the Act.

In *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138 (9th Cir. 1976), cert. denied, No. 76-123 (1976), that Court determined that an employer is responsible for the actions of its attorney of those actions are authorized by the employer and performed on behalf of the employer's interests.

This same principle has been applied to labor organizations by Section 301(b) of Labor Management Relations Act.[11]

In all proceedings before the Board and the Circuit

11. "Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents." 29 U.S.C. §185(b)

Court the uncontradicted testimony shows that the Charging Parties relied upon the advice of counsel. Further, this seems to stand for the proposition that the advice, standing alone, removes and absolves the Charging Parties from any wrongdoing and affords them the protection of Section 7 of the Act.

The application of the law of agency that exists between an attorney and his client demands that it be extended to include the proposition that the individual who authorizes the acts of the attorney stands in the shoes of that attorney and be judged by those acts.

The failure of the Circuit Court to even address itself to this proposition creates the impression that any group of individuals who rely upon the advice of counsel falls within the protection afforded under Section 7 of the Act. If this be the case, then certainly the future of labor-management relations will be jeopardized. Employees will be able to circumvent their statutorily created collective bargaining agent in favor of their own counsel so that they will not be held personally responsible for the acts of their counsel.

This activity could certainly frustrate the intent of Congress and the national policy which strongly favors collective bargaining between employers and unions; strongly favors the voluntary settlement of labor disputes; and, strongly favors employees and employers dealing exclusively with authorized collective bargaining agents.

A writ of certiorari should issue because the law of agency as applied to the employee-attorney relationship in the sphere of federal labor law is not settled; and, if the Circuit Court's Order is not reviewed, then all employees would be relieved of any obligations imposed upon them by the body of federal labor law and policy which would result in disparate treatment to employers and unions.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FEDERAL STATUTES INVOLVED

National Labor Relations Act, 29 U.S.C. §§151, *et. seq.*

(1) Section 7, 29 U.S.C. §157

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

(2) Section 8(a)(1), 29 U.S.C. §158(a)(1)

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ."

APPENDIX B

In the Matter of the Arbitration Between
Teamsters, Chauffeurs, Warehousemen &
Helpers Local Union No. 144
and
Trinity Trucking & Materials Corp.

OPINION

When the Union and the Company determined that they could not resolve the grievances of Lloyd W. Joy, Wallace W. Simmons and Jack Gibbens they submitted them to Patrick J. Fisher as sole Impartial Arbitrator. Pursuant to notice a hearing was held in the Holiday Inn at Terre Haute, Indiana, on September 11, 1974. At the outset both parties waived the contractual requirement that a decision be rendered immediately after hearing the evidence. At this hearing the parties were given the opportunity to present oral and written evidence, to examine and cross-examine witnesses and to make arguments. After a transcript of the testimony was prepared the Company submitted a post-hearing brief on October 12, 1974. The Union waived its right to file such a brief.

On June 28, 1974, Lloyd W. Joy, Wallace W. Simmons and Jack Gibbens, all of whom were employed by the Company as Truck Drivers, filed suit against the Company and three other corporations in the Vigo County Superior Court. Because one of those corporations, Wabash Valley Asphalt Co., Inc. was its best customer, the Company concluded that the conduct of the three employees constituted gross insubordination. Thereupon, on July

3 it issued a formal written warning which was hand-delivered to each of the three employees. Because of that they filed a grievance on July 5, 1974, which reads as follows:

> **This is a General Grievance.**
> On Wed. July 3, 1974 Max Gibson handed a letter to Wallace W. Simmons, Jack Gibbens and Lloyd Joy. In the letter he stated he had also furnished a letter to Local 144 and representative. This I am sure was done.
> In the letter he threatened to fire us unless we withdrew a civil suit to recover wages etc. honestly earned by us and due us.
> We feel this is an unfair and unjustifiable act on the part of Trinity Trucking and Material. This is why we are filing this grievance.

On July 5 the Vice President of the Company went to the Asphalt Plant and asked each employee individually whether the lawsuit had been dismissed. When he got a negative response Mr. Joy, Mr. Simmons and Mr. Gibbens were discharged. Thereupon, on July 6, 1974, the three employees filed another grievance which provides:

> July 5, 1974 Max Gibson appeared on the job sight (sic) while we were working for Wabash Valley Asphalt and asked us if we would withdraw some of the civil suit. Our answer was no. In his letter of July 3-74 he stated he would fire us due to insubordination under our current contract paragraph X. This is not covered in our contract. Our job loss has nothing to do with our job performance. We charged he is discrimnating (sic) against us in the worst way when his threats would not change our actions.

> We should be put back to work with all benifits (sic) and wage loss due us.

The discharges were confirmed by individual letters on July 9 and copies were sent to the Union. Then, on July 11, 1974, the three employees filed a third grievance which states:

> Max Gibson came on the job sight (sic) July 5-74 and asked if we would consider withdrawing part of the civil suit now filed against Trinity Trucking and Materials for back wages honestly earned. When we replied no to the question he said we were fired. July 10-74 we received our letter of discharge dated July 9-74. This is personal and gross discrimnation (sic). We were working for Wabash Valley Asphalt and they have never complained about our job performance. We want the warning letters dismissed, all benifits (sic) restored, and pay loss restored us as we were unjustly and unfairly discharged.

The Union contends that the discharge of the grievants was not for just cause. It argues that the Company had no reason to discharge them because they had a right to file their lawsuit. The Union maintains that the concerted activity of the three grievants was protected because they were merely exercising the right granted to them by the National Labor Relations Act. It asserts that as a matter of public policy employees who in good faith think they have a claim should not be denied access to the courts.

The Company contends that the discharges of the three grievants did not violate the Collective Bargaining Agreement. It claims that they had a malicious motive in filing the punitive damage portion of their civil suit. The Company also maintains that the terminations of the grievants did not violate their rights under Section 7 of the

National Labor Relations Act.

The complaint which the three grievants filed in the Vigo County Superior Court contained three "counts." In the first "count" Lloyd Joy alleged that the Employer entered into a sub-contract with Wabash Valley Asphalt Co., Inc. and thereby became bound by the terms of a contract between Indiana Highway Constructors, Inc. and Indiana Conference of Teamsters. Mr. Joy further alleged that he has been an employee of the Company as an owner-driver-lessor and that the Company and its customer breached the contract by failing and refusing to pay the minimum wage rate for drivers and the minimum rental rate for trucks in the total amount of $20,000. In that "count" of the complaint Grievant Joy further alleged that the refusal to pay said wages and rental "has been intentional, malicious, oppressive and in heedless disregard" of his rights. He demanded judgment for $20,000 with interest and punitive damages in the amount of $100,000. In the second "count" of the complaint Wallace W. Simmons made basically the same allegations except that he claimed wages and rental in the total amount of $15,000 and punitive damages in the amount of $75,000. In the third "count" Jack Gibbens made approximately the same allegations, but his claim was limited to wages in the amount of $5,000 and punitive damages in the amount of $25,000.

The letter which the Employer delivered personally to each of the grievants on July 3, 1974, reads as follows:

> It has come to our attention that you have filed a complaint in the Vigo County Superior Court, Cause No. S-74-424, against your employer, Trinity Trucking & Materials Corp., as well as against one of its good customers, Wabash Valley Asphalt Co., Inc. That complaint, in addition to alleging the right to greater wages, accuses both the com-

pany, your employer, and its good customer, Wabash Valley Asphalt Co., Ihc., (sic) of intentional, malicious and oppressive conduct in heedless disregard of your rights and seeks punitive damages totaling $200,000 (over and above compensatory damages). These claims for punitive damages and charges of gross and wanton illegal conduct against your employer and against its good customer are unwarranted and go far beyond making an ordinary claim for wages. Such charges are devastating to the company's continued business and good will. Further, it is apparent from the extent of punitive damages claimed that you are seeking to destroy your employer financially and are not seeking to have an apparent disagreement over wage rates resolved in the spirit of perserving (sic) a continuing harmonious employment relationahip (sic). These charges and claims for punitive damages constitute gross insubordination and extreme disloyalty to the employer and to the common enterprise of workers and management and are wholly inconsistent with your continued employment by Trinity Trucking & Materials Corp.

This, this letter is to serve as a formal written warning, pursuant to Article X of the Collective Bargaining Agreement now in effect between Trinity Trucking & Materials Corp. and Teamsters' Local #144, that you will be discharged for insubordination and extreme disloyalty to the company and to the common enterprise, unless that part of your complaint to the above action in purporting to charge the company and its good customer, Wabash Valley Asphalt Co., Inc. with "intentional, malicious, oppressive, and heedless

disregard of the rights of the plaintiff", and the prayer to the extent that it purports to impose punitive damages, are withdrawn within forty-eight hours of your receipt of this letter and due notice of the withdrawal of those charges is given to the employer and to Wabash Valley Asphalt Co., Inc.

Pursuant to Article X of the Collective Bargaining Agreement, we are providing a copy of this letter to your bargaining representative, Teamsters' Local #144.

It was that letter which prompted the filing of the first grievance. The purpose of the letter was to protect the Company's good relations with Wabash Valley Asphalt Co., Inc., a customer engaged in the construction of highways and parking lots. The hauling which the Company does for that one customer represents seventy per cent of its income. Certainly the Employer had a legitimate interest in protecting that business. The letter of July 3 points out that the allegations by the grievants are unwarranted and that their demand goes far beyond an ordinary claim for wages. From the evidence it is concluded that the issuance of the warning letter was a reasonable response to the action of the grievants. Their grievance claiming that it was an unfair and unjustifiable act is without merit.

There is little dispute about the facts in this case. What is in question is the motive of the grievants in filing their lawsuit in the Vigo County Superior Court rather than utilizing the grievance procedure provided for in the Contract. Presumably the parties spent much time and effort in negotiating the Contract which sets out the system they adopted for resolving their disputes. The grievance procedure, which is described in Article VIII, is very broad. It provides a method for settling any differences which arise between the Company and the Union and any

employee as to the meaning and application of the provisions of the Contract. All of the grievants were acquainted with the grievance procedure. They had been employed for no less than three years, and at least two of them had utilized it successfully. Mr. Joy is a former Union steward who had prevailed when he processed a grievance over a wage claim under almost identical circumstances. That was in May or June when he alleged that he had not been paid properly while working on a job for another customer of the Company.

It is conceivable that if the grievants had relied upon the grievance procedure in this instance they all may have been as successful as Mr. Joy had been. However, the first notice that the Company had that they were dissatisfied was when the lawsuit was filed. In any event the three employees had agreed, through their bargaining representative, to be bound by the terms and provisions of the Contract. Article XIII (sic) provides:

> Should differences arise between the Company and the Union or any employee . . . such differences *shall be settled* in the following manner: . . . The aggrieved employee . . . shall record their grievance . . .

Obviously the grievants did not comply with that procedure.

Of even more significance than their refusal to be bound by the Contract is the refusal of the grievants to dismiss that part of their complaint charging that the failure of the Company and its principal customer to pay the wages and rental was "intentional, malicious, oppressive and in heedless disregard of the rights of the plaintiff" and that part of the prayer in their complaint demanding punitive damages. The punitive damage demand is five times the amount of the claim for wages. However the Indiana statute governing the recovery of wages (I.C. 22-2-5-2) doesn't mention punitive damages. It provides that an employer who fails to pay wages shall, as liquidated damages for such failure, pay an additional ten per cent of the amount due, not exceeding double the amount of unpaid wages.

There can be no doubt that the grievants were fully aware that the Company was not demanding a complete dismissal of their claim. They had written notice that only a portion of their complaint should be withdrawn and they were given a reasonable length of time in which to do it. In addition, before discharging the grievants the Company asked each of them whether he needed more time for reflection. It was not until they gave negative responses that the penalty of discharge was imposed.

The second grievance demonstrates that the three grievants knew that there was no request by the Company to dismiss the entire wage claim. Therein they state that Max Gibson "asked us if we would withdraw *some* of the civil suit." The grievants' recognition of the distinction between the wage claim and the demand for punitive damages is repeated in the third grievance which states that Gibson asked if they "would consider withdrawing *part* of the civil suit."

At the very least the refusal of the grievants to withdraw the objectionable part of their complaint constituted disloyalty. They were fully aware of the importance of Wabash Valley Asphalt Company as a customer. That relationship was reiterated in the warning letter. The Company had every reason to be concerned that it was going to be damaged seriously in its dealings with its best customer. No stockholder, officer or employee of Trinity holds any Wabash Valley stock. Consequently the fear of a deteriorationship in the relationship was very real. Therefore the Company had every reason to insist that the derogatory statements be withdrawn.

Although Mr. Joy claimed that he acted in good faith, there is evidence to the contrary. On more than one occasion he stated that he was going to put the Company out of business. The evidence on that point was buttressed by the testimony of two other truck drivers. The credibility of Joy's claim is further diminished by his failure to appeal the following reprimand:

> It has come to our attention that you have been spreading slanderous lies concerning the Gibson companies. We have confirmed reports that you have been telling various employees that: (1) if they would get behind you, you would "shut the Gibson's down"; that (2) Max Gibson is "paying off" the Teamsters Union; that (3) if they elected you steward and then didn't back you, you would "beat their ass".
>
> The remark made by you in number (1) above is wholly inconsistent with your contractual relationship with the Gibson companies and also improper. As you are well aware, the statement by you numbered (2) is wholly untrue. Such remarks are slanderous and are damaging the company's reputation and their relations with their employees. We demand that you cease and desist from spreading these or any similar lies. Should we receive another confirmed report of any similar slanderous remarks or remarks stating your intention to force the shut down of the "Gibsons" after you receive this letter, your relationship with the Gibsons will be immediately terminated.

Obviously the action of the grievants was deliberate. Their refusal to comply with the Company's request was made after they had an opportunity to consider the consequences. They had been warned in writing that if they did not withdraw the punitive damage portion of their complaint they would be discharged for insubordination. Therefore the action of the Company could not have come as a surprise. It was predictable.

In addition to the grievances which have been filed, a charge was instituted against the Employer with the National Labor Relations Board. That charge, which was filed by Mr. Joy, alleged that the three aggrieved employees were terminated "because they filed a breach of contract action." The National Labor Relations Board deferred action on that charge until such time the arbitration decision would be rendered.

The evidence establishes that the discharge of the grievants was imposed because of their failure to withdraw the claim for punitive damages, not because they "filed a breach of contract action." Mr. Joy, Mr. Simmons and Mr. Gibbens admitted that in their grievances.

If the grievants had been performing any activities on behalf of the Union they failed to mention that fact in their testimony. There is no evidence of any kind that the action of the Company was designed to discourage membership in the Union by discrimination in regard to tenure of employment or any term or condition of employment. On the contrary, the evidence establishes that the Employer negotiated a Union Shop provision in the Contract.

An employee should not be deprived of his right to assert a claim for wages due even if the claim is against a customer of his employer. In this instance, however, the lawsuit was for more than that. It alleged that the failure and refusal to pay wages and rental by the Company and its customer was intentional, malicious, oppressive and in heedless disregard of their rights. It also claimed punitive damages in the total amount of $200,000, an amount far

in excess of the limit established by the Indiana statute. It can not be found that the refusal of the grievants to withdraw that demand constituted a protected activity. Certainly it had nothing to do with their membership in the Union.

From the evidence in this case it is found that the Employer did not interfere with, restrain, or coerce the grievants in the exercise of any of the rights guaranteed in Section 7 of the National Labor Relations Act.

The discharge of the grievants for their failure to dismiss that portion of their complaint did not constitute discrimination. In fact, there is no evidence that any of the acts of the Employer were discriminatory.

The fact that insubordination or refusal to dismiss a punitive damage claim are not mentioned specifically in the Contract does not establish that the Company lacked cause for the termination of the grievants. Article XXVIII of the Contract recites that all functions, powers and authority not specifically abridged shall be retained by the Company. That article also states that the Company retains the power and authority to direct the working force and to discharge employees for proper cause. That contemplates that the Company can take appropriate action, including discharge, in order to protect itself against employees who are attempting to do it harm. The failure of the grievants to heed the warning of July 3 was reason enough to take the disciplinary action. That letter specified what the penalty would be. From all of the evidence it is concluded that the discharge of the grievants was for just cause.

AWARD

The discharge of Lloyd W. Joy, Wallace W. Simmons and Jack Gibbens was for just cause and was not in violation of the Collective Bargaining Agreement.

The three grievants were not coerced, interfered with or restrained in the exercise of their rights under Section 7 of the National Labor Relations Act.

The grievances are denied.

/s/ PATRICK J. FISHER
Patrick J. Fisher — Impartial Umpire

November 19, 1974

APPENDIX C

221 NLRB No. 64

FJP

D–588
Terre Haute, Ind.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 25–CA–6402

Trinity Trucking & Materials Corp.
and
Lloyd Joy, an Individual

DECISION AND ORDER

Lloyd Joy, an individual, filed a charge on July 17, 1974, which was duly served on Respondent Trinity Trucking & Materials Corp., hereinafter called Respondent or Company. In the charge, it was alleged that Respondent had discharged employees Joy, Simmons, and Gibbens in violation of Section 8(a)(1) and (3) of the Act. The three employees also filed grievances under their collective-bargaining agreement protesting their discharges. Thereafter, based on a letter from Respondent's counsel, the Regional Director for Region 25 of the National Labor

Relations Board deferred action on the charge pending arbitration of the grievances. On September 11, 1974, the arbitration was held, and on November 19, 1974, the arbitrator issued his award denying the grievances. On February 27, 1975, the Regional Director for Region 25 of the National Labor Relations Board issued a complaint and notice of hearing in this proceeding, alleging that Respondent had engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and (3) and 2(6) and (7) of the National Labor Relations Act, as amended. Respondent filed an answer, admitting in part and denying in part, the allegations of the complaint, and requesting that the Board defer to the arbitrator's award.

Thereafter, Respondent filed a "Motion for Summary Judgment and Transfer of Case" and a memorandum in support thereof, with exhibits attached. Respondent moves the Board to enter summary judgment in its favor on the ground that there is no genuine issue as to any material fact, inasmuch as the grievances have been fairly and finally resolved through arbitration. The General Counsel filed a response in opposition to Respondent's Motion for Summary Judgment, as well as a Motion for Summary Judgment against the Respondent, based on the facts admitted by Respondent in its brief. In the alternative, General Counsel requested that the case be remanded for hearing under the provisions of Section 102.34 of the Board's Rules and Regulations. On April 7, 1975, in opposition to the General Counsel's response and motion, Respondent filed a reply brief.

On April 8, 1975, the Board issued an order transferring the proceedings before it and a Notice To Show Cause why the Respondent's and/or the General Counsel's motions should or should not be granted. Thereafter, on April 18, 1975, Respondent filed its "Statement in Support of its

Motion for Summary Judgment and Against Counsel for the General Counsel's Motion for Summary Judgment." On April 21, 1975, counsel for the General Counsel filed his "Statement of Cause in support of His Response to the Respondent's Motion for Summary Judgment and Motion for Summary Judgment against Respondent."

On April 16, 1975, counsel for the Charging Party, filed a "Motion for Enlargment (sic) of Time Within Which To Respond to Motion for Summary Judgment." On April 24, 1975, Respondent filed a "Memorandum in Opposition to Individual Counsel's Motion To Submit Evidence on the Merits of the Case." On May 2, 1975, counsel for the Charging Party filed a "Response to Defendant's Motion for Summary Judgment." On May 2, 1975, General Counsel filed a "Response to Board's Notice To Show Cause Against Respondent's Motion for Summary Judgment and Motion for Summary Judgment against Respondent." On May 7, 1975, counsel for the Charging Party filed an "Additional Response to Respondent's Motion for Summary Judgment." Finally, in response to counsel for the Charging Party and the General Counsel, Respondent, on May 14, 1975, filed a reply brief with addendum.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Rulings on Motions for Summary Judgment

The complaint alleges that Respondent unlawfully discharged employees Joy, Gibbens, and Simmons for engaging in protected concerted activity, including seeking to recover damages for lost wages from the Respondent in civil litigation. Respondent moves that we defer to an

arbitral decision upholding the discharges because, according to Respondent, the arbitral decision meets the *Spielberg* standards.[1]

General Counsel moves the Board to issue a Decision and Order against Respondent, containing findings of fact and conclusions of law as alleged in the complaint, and issue an appropriate order remedying the unfair labor practices so found. In the alternative, General Counsel moves the Board remand the case for hearing. General Counsel argues that the Board should not defer to the arbitrator's award because the award is repugnant to the policies of the Act.

There is no dispute regarding most of the facts in this case. On June 28, 1974, employees Joy, Gibbens, and Simmons filed a civil action against Respondent, Wabash Valley Asphalt Company, Inc. (Respondent's largest customer), and others. The employees' lawsuit was based on an alleged breach of contract for failing to pay the contract scale for wages and truck rentals for approximately 6 years. The employees, in their civil action, sought compensatory damages of $40,000 and punitive damages of $200,000. Respondent became aware of the employees' lawsuit on June 29, 1974. Thereafter, Respondent sent formal warning letters to the three employees, stating that they must withdraw within 48 hours that portion of their lawsuit seeking punitive damages or they would be discharged. When the three employees refused to withdraw any portion of their lawsuit, they were discharged. Following their discharges, the three employees filed grievances with their Union[2] protesting their discharges. Employee Joy filed an unfair labor practice charge with the

1. *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

2. Local Union No. 144, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Board, alleging that the three discharges were in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.[3]

On September 11, 1974, the arbitrator issued his award, finding that Respondent was justified in terminating employees Joy, Gibbens, and Simmons. The arbitrator found that the discharges did not violate either the collective-bargaining agreement or the rights of the employees under Section 7 of the National Labor Relations Act, as amended.

In regard to the Section 7 rights of employees filing civil actions against their employer, the Board in *Leviton Manufacturing Company, Inc.*,[4] reiterated the applicable principle that the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith. In denying enforcement of our Order, the First Circuit concluded, in agreement with the Administrative Law Judge and contrary to the Board, that the employees in that case had filed their lawsuit in bad faith. However, as we read its decision, the court agreed with the Board that the applicable principle of law was correctly stated in *Leviton*.

As it is apparent that the arbitrator, in making his award, failed to recognize the governing principle of law and the right of employees to sue their employer in a civil

3. Members Fanning and Jenkins do not agree with the Regional Director's action in deferring action on the charge pending arbitration, but believe that the Regional Director should have proceeded to the merits of the case upon the filing of the charge, for reasons set forth in their dissenting opinions in *Collver Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971), and related cases.

4. 203 NLRB 309, (1973), enforcement denied 486 F.2d 686 (C.A.1, 1973). See also *Sarkes Tarzian, Inc.*, 149 NLRB 147 (1964); *Socony Mobil Oil Company, Inc.*, 153 NLRB 1244 (1965), enfd. as modified 357 F.2d 662 (C.A. 2, 1966).

action, we shall not defer to the arbitrator's award. We do not refuse to defer to the arbitrator's award because we would have reached a different result. Rather, because the arbitrator totally failed to view the case in light of rights accorded by the Act, we must conclude that the award was repugnant to the policies of the Act.

In requesting that we defer to the arbitrator's award, Respondent contends that the actions of employees Joy, Simmons, and Gibbens were taken in bad faith and that the arbitrator so found. Under our decision in *Leviton*, bad faith would render the employees' actions unprotected. However, we cannot conclude that the arbitrator, based on matters apart from the lawsuit itself,[5] found any bad faith by the employees. Rather, the arbitrator, in finding the discharges justified, relied on the fact that the employees brought a lawsuit rather than grieving under the collective-bargaining agreement and that they requested (and failed to withdraw their claim for) punitive damages in their lawsuit. However, if the right of employees to file a labor-related lawsuit is a protected activity, the fact that the suit is filed cannot establish bad faith.[6] Further, although the governing principle of law

5. Respondent contends that the bad faith of employee Joy in filing the lawsuit is established by evidence adduced at the arbitration hearing showing that Joy had long evidenced malice toward the Respondent. However, it does not appear that the arbitrator made a finding of bad faith but rather found only that the actions of Joy, as well as those of Simmons and Gibbens, were "deliberate." That finding does not answer the crucial question of what was the motivation of the three employees. Certainly, in regard to Simmons and Gibbens, there is no finding and no evidence, based on matters apart from the lawsuit, that they acted in bad faith.

6. We note that the employees' civil action sought relief based on a period of 6 years, whereas the grievance procedure of the contract necessitates the filing of a grievance within 10 days of occurrence of the event out of which the grievance arises.

does not preclude an examination of the civil suit and its attendant pleadings, we do not find it particularly significant that the employees sought punitive damages in their civil action. The pleadings do not decide the lawsuit, and the merits of the lawsuit, including the matter of remedies, are best left to the court hearing the lawsuit. The protected right of employees to file a civil action would be seriously diluted should we, based on the pleadings in the suit, decide that certain aspects of the suit are without merit and therefore establish bad faith. If the lawsuit is filed in good faith, the fact that it may have been groundless or that it was later dismissed on the pleadings would not in itself make the activity unprotected or establish bad faith. Cf. *Walls Manufacturing Company, Inc.*, 137 NLRB 1317 (1962). Further, the discharges are not justified because the Respondent sincerely believed the action to have been brought in bad faith if the suit was actually brought in good faith.

The arbitrator's ultimate conclusion was that "the discharge of the grievants was imposed because of their failure to withdraw the claim for punitive damages." That conclusion was obviously based on the arbitrator's finding that the filing of a lawsuit containing a claim for punitive damages (which claim the employees refused to withdraw at the Employer's request) constituted "disloyalty" and not protected activity. The arbitrator did not base his conclusion upon any finding of bad faith by the employees. Therefore, as it is clear that the arbitrator failed to recognize the governing principle of law as stated by the Board in *Leviton* and apply that principle to this case, we must conclude that his award was repugnant to the purposes of the Act and we shall not defer. Accordingly, we shall deny Respondent's Motion for Summary Judgment.

General Counsel moves for Summary Judgment against Respondent based on the facts admitted in Respondent's

brief. However, having examined the Respondent's position in this case, we find no admission by Respondent that the three employees filed their lawsuit in good faith. Respondent argues that the lawsuit was undertaken in bad faith. Therefore, we find that the motive of the employees in filing their lawsuit remains a crucial and unresolved issue in this case. In light of the governing principle of law and the facts before us, we conclude that we do not have sufficient facts to resolve the issues in this case. We shall therefore deny the General Counsel's Motion for Summary Judgment and allow the merits of the complaint to be decided after a hearing before an Administrative Law Judge.

ORDER

It is hereby ordered that the Respondent's Motion for Summary Judgment and General Counsel's Motion for Summary Judgment be, and they hereby are, denied.

IT IS FURTHER ORDERED that a hearing be held before an Administrative Law Judge to be designated by the Chief Administrative Law Judge for the purpose of receiving evidence on the issues raised by the allegations of the complaint.

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it is hereby is, remanded to the Regional Director for Region 25 for the purpose of arranging such hearing, and that the said Regional Director be, and he hereby is, authorized to issue such notice thereof.

IT IS FURTHER ORDERED that, upon the conclusion of the hearing, the Administrative Law Judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based upon the evidence received and that, following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D.C.
November 5, 1975

John H. Fanning,
Member

Howard Jenkins, Jr.,
Member

John A. Penello,
Member

(SEAL) NATIONAL LABOR
RELATIONS BOARD

APPENDIX D

JD-343-76
Terre Haute, IN.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

Case 25–CA–6402

Trinity Trucking & Materials Corp.
and
Lloyd Joy, An Individual

John Petrison, Esq., for the General Counsel.
Stephen C. Cline, Esq., and *Ronald T. Pfeifer, Esq. (Cline and Callahan)*, of Indianapolis, IN, for the Respondent.
Gerald H. McGlone, Esq., of Terre Haute, IN, for the Charging Party.
Fred O. Towe, Esq., of Indianapolis, IN, for the Intervenor, Indiana Conference of Teamsters.
Robert W. Kilroy, Esq., of Jeffersonville, IN, for the Intervenor, Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 144.

DECISION

Statement of the Case

RICHARD L. DENISON, Administrative Law Judge: This case was tried on February 24, 25, and 26, 1976, in Terre Haute, Indiana, pursuant to a Decision and Order of the National Labor Relations Board, dated November 5, 1975, reported in 221 NLRB No. 64, wherein the Board denied Motions for Summary Judgment by both the General Counsel and by the Respondent, and ordered that a hearing be held for the purpose of receiving evidence on the issues raised by the allegations of the complaint. The complaint alleges that *Trinity Trucking & Materials Corp.*, the Respondent, violated Section 8(a)(1) and (3) of the Act by discharging Lloyd Joy, Wallace Simmons, and Jack Gibbens on July 5, 1974 (after having also allegedly violated Section 8(a)(1) on July 3 by threatening to discharge them) because of their union and concerted activities, specifically, a civil action they filed against Respondent and its principal customer seeking damages for lost wages. Respondent denied the commission of any unfair labor practices, and in a memorandum supporting its Motion for Summary Judgment sought to persuade the Board to defer to an arbitration award of February 27, 1975, denying the discharge grievances of the employees, pursuant to the policy enunciated in *Spielberg Manufacturing Company*, 112 NLRB 1080. After observing that no dispute exists concerning most of the facts which give rise to this proceeding, the Board held that the arbitrator's award was repugnant to the policies of the Act, since he based his decision on his finding that the discharges were imposed by the grievants' refusal to withdraw that portion of their civil suit which sought punitive damages, an act of disloyalty he concluded was not protected by the Act. The Board reaffirmed the controlling principle of law

discussed in *Leviton Manufacturing Company, Inc.*, 203 NLRB 309, ignored by the arbitrator, that the filing of a civil suit by a group of employees is protected actively unless prompted by malice or bad faith. Since the arbitrator made no bad-faith finding, although Respondent had advanced the argument, the Board found "...that the motive of the employees in filing their lawsuit remains a crucial and unresolved issue in this case," and remanded this matter for a hearing.

Upon the entire record in this case, including my observation of the witnesses, and upon the consideration of the brief filed by all parties, I make the following:

Findings of Fact

I. Jurisdiction

As admitted in the answer, I find that at all times material herein Respondent is and has been an Indiana corporation maintaining its principal office and place of business at Terre Haute, Indiana, where it is engaged in the business of performing hauling services for construction materials. During the past year, a representative period, in the course and conduct of its business operations, Respondent purchased, transferred, and delivered to its Terre Haute facility goods and materials valued in excess of $50,000 directly from points outside the State of Indiana. In addition, during the same period of time, the Respondent furnished hauling services valued in excess of $50,000 to Indiana firms, each of whom purchased and caused to be shipped to their respective locations in the State of Indiana goods and materials valued in excess of $50,000, and either manufactured, sold, and shipped from their respective locations goods valued in excess of $50,000 directly to points outside the State of Indiana, or sold at retail goods and materials valued in excess of $500,000. I therefore find that Respondent is now, and has been at all

times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organizations Involved

As admitted in the answer I find that Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 144, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereafter referred to as Local 144, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Based on undisputed evidence adduced at the hearing, I also find that Indiana Conference of Teamsters, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereafter referred to as the Indiana Conference, is, and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Undisputed Facts

The Respondent, which until sometime during 1973 did business under the name of Gibson Coal & Supply Company, Inc., has at all times material herein been engaged in the business of hauling construction materials in Vigo County, Indiana. The city of Terre Haute is the County Seat of Vigo County. Respondent utilizes both its own trucks driven by employee drivers and, when needed, trucks leased to it by owner-operators. Alleged discriminatees Lloyd Joy and Wallace Simmons perform work for Respondent in both of these two categories, while alleged discriminatee Jack Gibbens always operated a company truck. Joy, Simmons, and Gibbens, are all members of Local 144 which first signed a 1-year collective-bargaining agreement with Respondent in September 1972, later ex-

tended to March 6, 1974, at which time the current agreement, terminating January 31, 1977, was executed.

An overwhelming majority of Respondent's hauling services are performed for Wabash Valley Asphalt Co., hereafter called Wabash, a Terre Haute, Indiana, company engaged in the business of manufacturing asphalt and constructing asphalt roads and parking lots. Since at least 1962 Respondent and Wabash have maintained this business relationship on the basis of an annual rate quotation by Respondent. Wabash is a member of the Indiana Highway Constructors, Inc., an employer association which bargains collectively on behalf of its members and has a statewide contract with the Indiana Conference of Teamsters. The current agreement, commonly known as the "Blue Book" is effective from May 1, 1974 to April 30, 1977. This agreement was preceded by two other agreements to which Wabash was bound, the "Red Book" effective May 1, 1971 to April 30, 1974, and the "Black Book" effective January 1, 1968 to December 31, 1970. The Black, Red, and Blue Books each specify wage rates and truck rental rates exceeding those rates paid, during the comparable period of time, by Respondent to its drivers and owner operators. In addition, the Black, Red, and Blue contracts contain clauses relating to the scope of the work covered by these agreements, and which refer to "...subcontractors, trucking companies who contract with the Employer and all owner-operators who contract with, lease or rent to the Employer ..."[1]

Lloyd Joy began working for Respondent in May or June of 1968 as an owner operator. He also leased one additional truck to the Company. Later, in January 1974, he ceased renting trucks to Trinity, and for the remainder

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1. Quote from Article II Section 2(c) of the "Red Book." See also Article II Section 1, Section 2(a); and Article XXI, Section 1.

of his employment drove Respondent's trucks. Wallace Simmons first became employed by Respondent in 1967 and thereafter, at various times until his discharge, was paid as a driver and owner operator. Jack Gibbens started his employment with Respondent in 1971 as a company driver, and was never employed as an owner operator. Most of the hauling work performed by these employees was with respect to Wabash jobs. Although Gibbens never served in any official capacity with Local 144 after it was recognized by Trinity in the fall of 1972, Lloyd Joy served on the committee which negotiated the first agreement signed in September 1972, and again in 1973, and as steward until April 1973. Simmons also served on the negotiating committee for the current agreement. Sometime after the signing of Respondent's initial contract with Local 144, Joy first obtained a copy of the Red Book, and based on the testimony of Respondent's former vice president, Max Gibson, Joy, and Simmons, it appears that in late 1972 a dispute arose between Joy and Respondent, in which the Union became embroiled, concerning Trinity's liability to pay Red Book wage and rental rates. The president of Local 144, George Hanks, testified that the Union "made repeated suggestions" that Trinity should sign the Red Book. Although the exact dates and sequence of all the events in this lengthy economic battle are somewhat unclear, the significant milestones on Joy, Simmons, and Gibbens' journey toward litigation and termination may be identified. At one point in 1972 or 1973 Max Gibson met with all the Trinity drivers and orally agreed to pay Red Book rates for deliveries to Indiana State highway jobs. The dispute continued, and during the negotiations which resulted in Trinity's separate 1974 agreement with Local 144, it is clear that Joy led a faction in favor of striking to force Respondent to "sign the Red Book!" However, when a vote was taken at a union meeting, this

course of action was rejected and the membership voted to accept the negotiated contract. Throughout this turmoil Joy continued to maintain that the wording of certain "Red Book" clauses, in any event, obligated Trinity to pay "Red Book" rates. Moreover, according to George Hanks, the Local Union also has maintained this position since 1972.

As events developed, despite his oral side agreement with the Trinity drivers, Gibson did not pay Red Book rates for any work performed for Wabash, and adopted a firm position that the Red Book did not apply to Respondent. On May 13, 1974 Joy filed a grievance seeking the difference in the wages he received on the "Burnett Pavement" job "5-1-74 and 5-2-74." Joy filed a second grievance on May 31, 1974 concerning work performed on the Burnett pavement job, and the Highway 63 and Woolworth parking lot jobs. Respondent settled these grievances by paying Joy the difference in the wage rates, except that with respect to the May 31 grievance, Respondent refused to pay that portion of Joy's claim which fell outside the limitations period of the contract. Thereafter, Trinity drivers did not receive the wage rates specified in the Blue Book, which succeeded the Red Book effective May 1, 1974. After discussing the situation with Simmons and Gibbens, Joy suggested seeking the advice of Attorney Gerald McGlone who advised them to file a damage suit seeking both compensatory and punitive damages. On June 29, 1974 a suit was filed in Vigo County Superior Court for $40,000 compensatory and $200,000 punitive damages against both Respondent and Wabash.[2] Upon

2. The plaintiffs contend that under the common law of the State of Indiana, Trinity and Wabash are jointly and severally liable for back wages not paid under the Black and the Red Book contracts, and that punitive damages are recoverable since the defendants' action was intentional, malicious, oppressive, or in heedless disregard of the plaintiffs' rights.

learning of the filing of this lawsuit and of Wabash's displeasure of having become involved in the controversy between Trinity and its employees, on July 3, Max Gibson handed each of the employees a copy of the following letter:

Mr. Lloyd Joy
Mr. Wallace W. S[illegible]s
Mr. Jack Gibbens

Gentlemen:

It has come to our attention that you have filed a complaint in the Vigo County Superior Court, Cause No. S-74-424, against your employer, Trinity Trucking & Materials Corp., as well as against one of its good customers, Wabash Valley Asphalt Co., Inc. That complaint, in addition to alleging the right to greater wages, accuses both the company, your employer, and its good customer, Wabash Valley Asphalt Co., Inc., of intentional, malicious and oppressive conduct in heedless disregard of your rights and seeks punitive damages totaling $200,000 (over and above compensatory damages). These claims for punitive damages and charges of gross and wanton illegal conduct against your employer and against its good customer are unwarranted and go far beyond making an ordinary claim for wages. Such charges are devastating to the company's continued business and good will. Further, it is apparent from the extent of punitive damages claimed that you are seeking to destroy your employer financially and are not seeking to have an apparent disagreement over wage rates resolved in the spirit of perserving (sic) a continuing harmonious employment relationship. These charges and claims for punitive damages constitute gross insubordination and extreme disloyalty to the employer and to the common enterprise of workers and management and are wholly inconsistent with your continued employment by Trinity Trucking & Materials Corp.

Thus, this letter is to serve as a formal written warning, pursuant to Article X of the Collective Bargaining Agreement now in effect between Trinity Trucking & Materials Corp. and Teamsters' Local #144, that you will be discharged for insubordination and extreme disloyalty to the company and to the common enterprise, unless that part of your complaint in the above action in purporting to charge the company and its good customer, Wabash Valley Asphalt Co., Inc., with "intentional, malicious, oppressive, and heedless disregard of the rights of the plaintiff", and the prayer to the extent that it purports to impose punitive damages, are withdrawn within forty-eight hours of your receipt of this letter and due notice of the withdrawal of those charges is given to the employer and to Wabash Valley Asphalt Co., Inc.

Pursuant to Article X of the Collective Bargaining Agreement, we are providing a copy of this letter to your bargaining representative, Teamsters' Local #144.

Very truly yours,

TRINITY TRUCKING & MATERIALS CORP.

By
Roger McDonald, President

At the expiration of the 48-hour period each of the three

employees refused Respondent's demand, and each was discharged.

B. The Disputed Evidence Concerning the Issue of Malice and Bad Faith

No dispute existed concerning the facts summarized above. The only real issue in this case (indeed the crucial issue, referred to by the Board) is whether or not Joy, Simmons, and Gibbens filed their suit with malice and in bad faith. Respondent's affirmative defense is a claim that they maliciously intended to destroy Trinity, and in support of this position the following testimony was offered.

Joseph Lee Manuel, a city fireman, who also works for Trinity on alternate days together with his brother Russell Manual (sic), Jr., testified that on June 25, 1974 at the Shepardsville asphalt plant he overheard a portion of a conversation between Lloyd Joy and Henry Glasgow in which Joy said, "I'm tired of Gibson screwing me. If I had my way, they'd pay the price. If I could, I'd close down them." Glasgow was repairing a tire on Joy's truck at this time. Henry Glasgow testified that he had a conversation with Joy on State Road 63 north of Shepardsville, while repairing Joy's truck, in which Joy said he was tired of Gibson screwing him, and if he had his way he would put him out of business. However, Glasgow did not mention Joseph Manuel being present in the vicinity at the time of the conversation.

Russell Manuel testified that in the spring of 1973 (he was uncertain about the date) during a discussion with Joy about the Company, which occurred on the Paris Road, Joy said, "they didn't deserve to be where they was at now, and if he had his way he would break them—he would take this to the National Labor Relations Board."

Lloyd Joy denied ever making any remark to any fellow

employee about permanently closing down the Company. He agreed that during the 1973-1974 negotiations for the current contract he argued strongly for a strike to "shut down" the Company to force them to pay the Red Book scale. Joy acknowledged having a conversation with Henry Glasgow at the Shepardsville plant while a tire was changed, which Glasgow began by asking, "Lloyd, what's the matter with you and Max?" Joy answered, "Henry, only one thing. He won't pay the scale. He won't pay what the book calls for, and that's all." Glasgow responded, "Well, if he owes it, why don't he pay it?" Joy ended the discussion by saying, "Hell, I don't know. Why don't you ask him?" According to Joy, Joseph Manuel was not present or in the area. I credit Joy's version. Firstly, as Joy himself related, it is simply illogical that Joy would want to put Trinity out of business, thereby destroying his job and those of other drivers whose wage rates he sought to increase. Secondly, Joseph Manuel's version and Henry Glasgow's version of the Glasgow-Joy Conversation differs in significant respects, specifically, the location, the words used, and the omission by Glasgow of any mention of Joseph Manuel's presence in the vicinity. Thirdly, Joy's account and explanation is consistent with other evidence in the record, including the testimony of Harry V. Rogers, Jr., assistant business agent of Local 144, which shows Joy had been vocal about "closing down" Respondent, in the form of strike action, until Trinity paid the Red Book rates. Finally, Joseph Manuel exhibited a sharp hostility toward Lloyd Joy while testifying, which was later explained on cross-examination, when it was revealed that Joy had objected to the Company's treating the Manuel brothers as one full-time employee for seniority purposes.

However, I credit the testimony of Russell Manuel, Jr., whose demeanor while testifying, unlike his brother, displayed no resentment toward Joy. Russell's answers on

cross-examination concerning the seniority disagreement with Joy persuaded me that his testimony had not been influenced by that event. Furthermore, Joy agreed that he had a conversation with Russell in the spring of 1973 in which he talked about striking Trinity and "closing" or "breaking" the Company to force the Company to pay the wage rates Joy believed were applicable to employees. His reference to seeking relief through the Board can only be construed in this vein. In this respect I find Joy's testimony about the incident does not conflict with that of Russell Manuel. Likewise, I find Joy's explanation consistent with the testimony of Local 144's president, George Hanks, called as a witness by the Intervenor. On cross-examination by Respondent, Hanks credibly testified as follows:

Q. Have you ever heard Lloyd Joy say that he was going to do Max Gibson in or Trinity in or run him out of business or any statements of that kind, to the best of your recollection?

A. I can remember a statement, yes.

Q. Would you tell the Administrative Law Judge when that statement took place, where it took place and who was there as best you can remember?

A. It was a statement—I don't know.

Q. What year?

A. As per year, per day or anything of this nature; however, there was a statement made in my office in the presence of Harry Rogers. Joy made the statement to me that he was going to break them or own them.

Q. Was this statement made prior to their dis-

charge—strike that.
Was this statement made prior to June 28th, 1974, which is the date the civil law suit was filed?

A. Yes.

MR. CLINE: No further questions.

Although Hanks was unable to fix the time of his conversation with Joy, Russell Manuel's testimony and that of Joy clearly indicates that the remark was made in 1973 when Joy was pressing the Union to strike Respondent for Red Book rates, and I so find.

There is one other portion of testimony concerning alleged remarks by Joy. Alleged discriminatee Jack Gibbens, called as a witness by Respondent under Rule 611(c) of the Federal Rules of Evidence, was examined concerning an undated, unsworn prepared statement he (and three other persons not called as witnesses) signed, at Max Gibson's request in his office, concerning shutting Gibson down. I find this evidence totally unreliable as support for Respondent's defense, since Gibson admitted pressuring Gibbens by saying, "Jack, I need a favor now. If you'd give me a favor, maybe I can give you one sometime in the future." Under these circumstances, Gibbens testified that he was afraid of losing his job if he turned Gibson down.

C. The Contentions of the Parties, Discussion and Concluding Findings

The General Counsel and the Charging Party urge that Joy, Simmons, and Gibbens filed their lawsuit upon the advice of their attorney, only when it became evident that other avenues through which relief might be sought were for all practical purposes unavailable; consequently, they acted in good faith. Respondent contends that the alleged

discriminatees filed their lawsuit with malice and bad faith within the meaning of the Board's *Leviton* decision, thereby forfeiting the Act's protection. Respondent argues that Simmons and Gibbens' failure to use the grievance procedure in Local 144's collective-bargaining agreement with Trinity with respect to their wage claim and Joy's failure to file periodic grievances for wages, while all three men immediately grieved over their discharges, proves bad faith. I cannot agree. Rather it appears from the evidence considered as a whole, that the alleged discriminatees' earlier inaction is largely attributed to Respondent's longstanding position that the Red Book was not applicable to Trinity hence raising the existence of substantial legal questions concerning whether relief relating to that agreement could be obtained under the grievance and arbitration clause in the Company's contract with Local 144.[3] Moreover, Respondent's later failure to honor its oral commitment to pay the Red Book rates, coupled with its assertion of the limitations period against Joy, when he did in fact file grievances, in a manner which would force him to file weekly grievances or forego his claim, is not the type of conduct which would inspire employee confidence in the ability to recover back wages through the grievance machinery. When considered against this background, the fact that Respondent settled Joy's May 13 grievance and a portion of the May 31 grievance carries no real significance with respect to Respondent's defense, even though the three employees filed their civil suit almost immediately thereafter.

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3. As argued by Intervenor, Local 144 in its brief, these are not questions to be decided in this proceeding. However, contrary to the Intervenor's position, I find it unnecessary to pass upon these issues in order to decide whether Joy, Simmons, and Gibbens acted in good faith for the purposes of the instant case.

Respondent contends that the statements made by Joy to employees, discussed earlier in this decision, show malice and bad faith. I disagree. Firstly, it should be noted there is no evidence that Simmons and Gibbens ever voiced their feelings on the wage issue to fellow employees. Secondly, the credited evidence concerning Joy's remarks fails to show that one of his objectives was to injure Trinity and destroy its relationship with Wabash. Instead, as the General Counsel contends, these remarks show Joy's increasing irritation and frustration over Trinity's failure to pay the Red Book rates, and his desire to force them to pay what Joy believed was lawfully owed to him and his fellow employees. This conclusion is reinforced by the fact that remarks were made in 1973 and early 1974, when the Red Book issue was the subject of such discussion in contract negotiations and in the consideration of possible strike action. In this context such words as Joy used acquire a specialized and limited significance not indicative of a desire to permanently injure or destroy Respondent's business.

Lastly, Respondent urges that the filing of the $40,000 lawsuit against their employer and his best customer seeking, in addition, $200,000 punitive damages, itself shows bad faith and malice. I cannot agree. The evidence shows that the civil suit was filed by their attorney, who advised them that such a course of action was a feasible means of obtaining the redress they sought. I find it inappropriate for me to pass upon the applicability of the Red and Blue Books to Respondent, or to presume to decide the validity of either the legal theory upon which the civil suit is based or the request for punitive damages. These are issues for another forum. Moreover, it is unnecessary, to a consideration of whether Joy, Simmons, and Gibbens engaged in protected concerted activity by filing their suit, to decide these questions. As the Board observed in

its Decision remanding this case for hearing:

> Rather, the arbitrator, in finding the discharges justified, relied on the fact that the employees brought a lawsuit rather than grieving under the collective-bargaining agreement and that they requested (and failed to withdraw their claim for) punitive damages in their lawsuit. However, if the right of employees to file a labor-related lawsuit is a protected activity, the fact that the suit is filed cannot establish bad faith. Further, although the governing principle of law does not preclude an examination of the civil suit and its attendant pleadings, we do not find it particularly significant that the employees sought punitive damages in their civil action. The pleadings do not decide the lawsuit, and the merits of the lawsuit, including the matter of remedies, are best left to the court hearing the lawsuit. The protected right of employees to file a civil action would be seriously diluted should we, based on the pleadings in the suit, decide that certain aspects of the suit are without merit and therefore establish bad faith. If the lawsuit is filed in good faith, the fact that it may have been groundless or that it was later dismissed on the pleadings would not in itself make the activity unprotected or establish bad faith. Cf. *Walls Manufacturing Company, Inc.*, 137 NLRB 1317 (1962). Further, the discharges are not justified because the Respondent sincerely believed the action to have been brought in bad faith if the suit was actually brought in good faith.

The General Counsel and the Charging Party have proved that the alleged discriminatees filed their lawsuit

upon the advice of their attorney based, as shown by an examination of the attendant pleadings, on an arguable legal theory; and that Joy, Simmons, and Gibbens were threatened with discharge on July 3 and discharged on July 5, when they refused to withdraw their punitive damage feature of their civil action. It thus became incumbent upon Respondent to come forward with evidence to prove, under the Board's *Leviton* decision that the three employees acted with malice and bad faith, thereby rendering their conduct unprotected. I find that Respondent has not sustained its burden, and that Joy, Simmons and Gibbens were engaging in protected concerted activity under the circumstances presented. Thus, Respondent's action in threatening to discharge them on July 3, and the discharges themselves on July 5, violated Section 8(a)(1) of the Act.[4]

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening Lloyd Joy, Wallace Simmons, and Jack Gibbens with discharge on July 3, 1974, if they refused to withdraw that portion of their civil suit which sought punitive damages, Respondent violated Section 8(a)(1) of the Act.

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4. I find it unnecessary to determine whether the Respondent's conduct also violated Section 8(a)(3) of the Act, since the appropriate remedial provisions are the same. I also find it unnecessary to determine whether or not Wabash Valley Asphalt Co. is a joint employer of Respondent's drivers when Respondent is performing work for Wabash.

4. By discharging Lloyd Joy, Wallace Simmons and Jack Gibbens because they filed a lawsuit against Respondent which sought both compensatory and punitive damages, Respondent discriminated against them because of their concerted activities for their mutual aid or protection, in violation of Section 8(a)(1) of the Act.

5. Respondent has not violated the Act in any respects other than those specifically found.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent is engaged in certain unfair labor practices, I find it necessary to order that Respondent cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Lloyd Joy, Wallace Simmons, and Jack Gibbens, I find it necessary to order that the Respondent offer them full reinstatement with backpay computed on a quarterly basis, plus interest at 6 percent per annum as prescribed in *F.W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, from date of discharge to date of proper offer of reinstatement. I shall also order the Respondent to post an appropriate notice with respect to the violations of Section 8(a)(1) of the Act found to have occurred.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

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5. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and (Continued)

ORDER

The Respondent, Trinity Trucking and Materials Corp., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, threatening to discharge, or otherwise discriminating against any employees for the purpose of discouraging employees from engaging in concerted activity for their mutual aid or protection.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Lloyd Joy, Wallace Simmons and Jack Gibbens immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, in the manner set forth in

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(Continued) recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

"The Remedy."

(b) Preserve and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant at Terre Haute, Indiana, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.

/s/ RICHARD L. DENISON
Richard L. Denison
Administrative Law Judge

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6. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN DECIDED THAT WE VIOLATED THE LAW, AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

WE WILL NOT discharge, or otherwise discriminate against Lloyd Joy, Wallace Simmons and Jack Gibbens, or otherwise punish employees because they have engaged in concerted activities for their mutual aid or protection.

WE WILL offer Lloyd Joy, Wallace Simmons and Jack Gibbens immediate and full reinstatement with backpay.

WE WILL NOT threaten employees with discharge or other reprisals if they engage in concerted activities for their mutual aid or protection.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

TRINITY TRUCKING AND MATERIALS CORP.

Dated _____ By _____
(Representative) (Title)

APPENDIX E

227 NLRB No. 121

MFP

D–1962
Terre Haute, Ind.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 25–CA–6402

Trinity Trucking & Materials Corp.
and
Lloyd Joy, an Individual

SUPPLEMENTAL DECISION AND ORDER

On May 28, 1976, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief, and Charging Party and General Counsel filed briefs in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the Na-

1. The Board's original Decision and Order in this case was reported at 221 NLRB 364 (1975).

tional Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Trinity Trucking & Materials Corp., Terre Haute, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.
January 7, 1977

Betty Southard Murphy,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX F

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued September 29, 1977
November 3, 1977

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

No. 77-1207

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRINITY TRUCKING & MATERIALS CORP.,
Respondent.

On Application for Enforcement of an
Order of the National Labor Relations Board.

ORDER

The National Labor Relations Board has applied for enforcement of its order requiring Trinity Trucking & Materials Corporation, an Indiana hauler of construction materials, to reinstate three former employees with back

pay plus interest. The order is reported at 227 NLRB No. 121. We grant enforcement.

In its original decision and order (221 NLRB 364), the Board noted that in February 1975 one of its regional directors had issued a complaint alleging that Trinity had engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and (3) and 2(6) and (7) of the National Labor Relations Act (29 U.S.C. §§158(a)(1) and (3) and 152(6) and (7), because it had discharged employees Lloyd Joy, Wallace Simmons and Jack Gibbens on the ground that they had sued Trinity to recover damages for lost wages. The Board found that on June 28, 1974, those employees had sued Trinity, its largest customer, and others on the ground that Trinity had failed to pay the full contract scale for wages and truck rentals[1] for six years. They sought compensatory damages of $40,000 and punitive damages of $200,000. On July 3, 1974, Trinity wrote the three employees that they would be discharged unless they withdrew their prayer for punitive damages within 48 hours. After they refused to do so, they were discharged and then filed discharge grievances with their Union.[2] Joy also filed an unfair labor practice charge with the Board on July 17, 1974, resulting in the issuance of the regional director's complaint.

The regional director deferred action on Joy's charge pending arbitration of the discharge grievances. On September 11, 1974, the arbitrator issued an award in Trinity's favor. The Board subsequently refused to defer to the arbitrator's award because he had not recognized the right of these employees to sue their employer unless done with

1. In its business Trinity used its own trucks and trucks leased from others.

2. Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 144.

malice or in bad faith. The Board noted that *Leviton Manufacturing Company, Inc.* v. *National Labor Relations Board*, 486 F.2d 686, 689 (1st Cir. 1973), had established that such a suit is protected activity under Section 7 of the Act unless the suing employees act in bad faith.[3] Therefore, the Board referred the merits of the complaint to an Administrative Law Judge (ALJ) to determine whether the employees had filed their lawsuit in good faith.

In February 1976, the ALJ tried this case in Terre Haute, Indiana. He found that in 1972 or 1973 Trinity's former vice president, Max Gibson, had orally agreed to pay its drivers at the higher so-called Red Book scale. However, Gibson later took a firm position that the Red Book scale did not apply to Trinity drivers. Joy thereupon filed two grievances which Trinity settled as to work performed within 15 days of the filing of each grievance by paying him the difference between the wages he had received and the higher Red Book wages; as to work not performed within 15 days of the filing of each grievance, the company's position was that such claims were barred by the limitations period of the collective bargaining contract. In May 1974 the Red Book wage rates were succeeded by Blue Book wage rates but Trinity refused to pay its drivers at the Blue Book scale. Consequently, Joy, Simmons and Gibbens filed the aforesaid breach of con-

3. Section 7 provides:
"Employees shall have the right of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this Act." (29 U.S.C. §157.)

tract lawsuit in Vigo County, Indiana, Superior Court, where we are advised it still pends.

The ALJ also found that these three employees were discharged in July 1974 because they had not withdrawn that part of their lawsuit seeking punitive damages. He found that the suit, including its punitive feature, was filed upon advice of counsel. Without passing on the merits of the damage suit, he also found that Trinity had not proved that the employees had "acted with malice and bad faith" in bringing their suit. Consequently, he concluded that Trinity violated Section 8(a)(1) of the Act[4] by threatening them on July 3 and discharging them on July 5 for failing to withdraw the punitive damage feature of their civil litigation. Based on these conclusions, the ALJ recommended that the Board order Trinity to offer the employees reinstatement with back pay and interest from the date of discharge, July 5, 1974, to the date of "proper offer of reinstatement." He also recommended that Trinity be required to post appropriate notices as to its violation of the Act.

On January 7, 1977, the Board adopted the ALJ's decision and recommended order which the Board now asks us to enforce. We agree with the First Circuit in *Leviton, supra,*[5] that the filing of a damage action of this nature by employees is a concerted action protected by Section 7 (note 3, *supra*) unless the employees acted in bad faith. Therefore, the question before us is whether Trinity proved that Joy, Simmons and Gibbens acted in bad faith

4. Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7."

5. *Leviton* has also been accepted by the Fifth Circuit. *Altex Ready Mixed Concrete Corp.* v. *National Labor Relations Board,* 542 F.2d 295 (5th Cir. 1976).

in filing their lawsuit.

Given the barriers to recovery resulting from Trinity's 15-day limit on payments, the employees' request for punitive damages, which was filed on the advice of counsel, was based on facts arguably similar to those that other litigants in the state, and later the Indiana courts, determined to be sufficient to justify an award of punitive damages. See *Vernon Fire Casualty Insurance Co.* v. *Sharp,* 316 N.E.2d 381 (Ind. Ct. App. 1974), modified, 349 N.E.2d 173 (Ind. Sup. Ct. 1976); *Rex Insurance Co.* v. *Baldwin,* 323 N.E.2d 270 (Ind. Ct. App. 1975). Particularly in this context, Trinity's view that the request for punitive damages by itself should prove bad faith would take away the full panoply of legal remedies given by *Leviton* in precisely the cases in which civil litigation has the most to offer in comparison with filing charges with the Board.

The ALJ credited Joy's explanation that it was necessary to file the Indiana lawsuit in order to avoid filing grievances bimonthly or weekly. In view of Trinity's adamant position that it was not required to pay the higher wage rates claimed and its practice of paying such rates only when individual grievances were filed, it was appropriate for the employees to sue Trinity without the necessity of their filing additional grievances. *Vaca* v. *Sipes,* 386 U.S. 171, 185; cf. *Orphan* v. *Furnco Construction Corporation,* 466 F.2d 795, 803 (7th Cir. 1972).

The employees cannot be faulted because of their joinder of Trinity's primary customer, Wabash Valley Asphalt Company, as a defendant since the lawsuit was based on a contract between Wabash and an affiliated union (Indiana Conference of Teamsters) binding Trinity as a subcontractor of Wabash. Obviously it was essential to join Wabash to avoid the inevitable defense that a necessary party had been omitted as a defendant. While Trinity contends that the bad faith of the three employees was also shown by

certain remarks of Joy,[6] the ALJ credited Joy's version of those remarks, and, except in circumstances not present here, we may not disturb his credibility findings. *Sarkes Tarzian, Inc.* v. *National Labor Relations Board*, 374 F.2d 734, 736 (7th Cir. 1967), certiorari denied, 389 U.S. 839. As the ALJ explained, the credited evidence concerning Joy's remarks does not show that he intended to injure Trinity or to destroy its relationship with Wabash. Instead, those remarks "show Joy's increasing irritation and frustration over Trinity's failure to pay the Red Book rates, and his desire to force them to pay what Joy believed was lawfully owed to him and his fellow employees" (ALJ decision 9; App. 19). The ALJ also credited Joy's denial that he made additional hostile remarks about Trinity a few days before the lawsuit was filed. Not having observed the witnesses, we cannot set aside that finding.

Since the Board's order is proper under Section 7 of the Act and is supported by substantial evidence, it will be enforced.

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6. Much stronger remarks were excused by this Court in *Dreis & Krump Mfg. Co., Inc.* v. *National Labor Relations Board*, 544 F.2d 320, 328-329 (7th Cir. 1976).

APPENDIX G

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 30, 1977

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

No. 77-1207

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRINITY TRUCKING & MATERIALS CORP.,
Respondent.

On Application for Enforcement of an
Order of the National Labor Relations Board.

ORDER

On consideration of the respondent's petition for rehearing, the word "arguably" is inserted before "binding" in the sixth from last line of page 4 of our order of November 3, 1977.

No member of the panel and no judge in regular active

service has requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel has voted to deny a rehearing. Therefore,

IT IS ORDERED that the respondent's petition for a rehearing is denied.

APPENDIX H

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 14, 1977

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

No. 77-1207

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRINITY TRUCKING & MATERIALS CORP.,
Respondent.

Petition for Enforcement of an
Order of the National Labor Relations Board.

This matter comes before the court on the "MOTION TO STAY EXECUTION OF ORDER ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD" filed herein on December 5, 1977 by counsel for the respondent. On consideration thereof, this court being fully advised in the premises,

IT IS ORDERED that said motion be, and the same is hereby, DENIED.

APPENDIX I

United States Court of Appeals
For the Seventh Circuit

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge,*
Hon. WALTER J. CUMMINGS, *Circuit Judge,*
and Hon. PHILIP W. TONE, *Circuit Judge*

No. 77-1207

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRINITY TRUCKING & MATERIALS CORP.,
Respondent.

JUDGMENT

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a supplemental order issued by it against Respondent, Trinity Trucking & Materials Corp., Terre Haute, Indiana, its officers, agents, successors, and assigns, on January 7, 1977. The Court heard argument of respective counsel on September 29, 1977, and has considered the briefs and transcripts of record filed in this cause. On November 3, 1977, the Court, being fully advised in the premises, issued its Order granting enforcement of the

Board's supplemental order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Seventh Circuit that the said supplemental order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Trinity Trucking & Materials Corp., Terre Haute, Indiana, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said supplemental order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Respondent.

A True Copy:
Teste:

/s/ WALTER J. CUMMINGS
Walter J. Cummings
Circuit Judge, United States
Court of Appeals for the
Seventh Circuit

/s/ P. NEEDHAM, DEPUTY
P. Needham, Deputy
Clerk of the United States
Court of Appeals for the
Seventh Circuit

No. 77-1173

Supreme Court, U. S.
FILED
APR 11 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

TRINITY TRUCKING & MATERIALS CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
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LINDA SHER,
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Attorney,
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Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1173

TRINITY TRUCKING & MATERIALS CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A47-A52) is reported at 567 F. 2d 391. The decision and order of the National Labor Relations Board (Pet. App. A14-A22) are reported at 221 NLRB 364. The supplemental decision and order of the National Labor Relations Board (Pet. App. A23-A46) are reported at 227 NLRB 792.

JURISDICTION

The judgment of the court of appeals (Pet. App. A56) was entered on January 17, 1978. The petition for a writ of certiorari was filed on February 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(1) of the National Labor Relations Act by discharging three employees who filed a civil suit against the Company and the firm for which it is a subcontractor, claiming compensatory and punitive damages for breach of a collective bargaining agreement.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. App. A1.

STATEMENT

1. Petitioner (herein "the Company"), a hauler of construction materials, had a collective bargaining agreement with the Union.[1] The Company did most of its hauling on subcontracts for Wabash Valley Asphalt Company (herein "Wabash"), which was a party to a statewide collective bargaining agreement with the Indiana Conference of Teamsters (herein "the Red Book contract"). The Red Book contract provided for higher wage rates than did the Company's contract with the Union. It also provided that its terms would be applicable to subcontracts of covered employers insofar as the subcontractors engaged in hauling materials for highways or heavy construction jobs covered by the agreement. (Pet. App. A26-A27.)

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[1]Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 144, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

In late 1972, a dispute arose over the rates for jobs performed by the Company as a Wabash subcontractor. Led by employee Lloyd Joy, the Union insisted that the Company pay Red Book rates rather than the rates it was obligated to pay under the Union contract. At one point, Joy advocated a strike to "shut down" the Company and force it to pay Red Book rates (Pet. App. A28-A29, A33).[2] The Company orally agreed to pay Red Book rates for Wabash jobs on Indiana state highways, but failed to do so (Pet. App. A28). When Joy filed grievances under the contract grievance procedure based on this failure, the Company agreed to pay Red Book rates only for the 15 days prior to the filing of each grievance, relying on a provision of the Red Book contract which required grievances to be filed within 15 days of their occurrence (Pet. App. A49).

Faced with the prospect of having to file an individual grievance each time the Company failed to pay the appropriate rates, Joy, with fellow employees Wallace Simmons and Jack Gibbens, consulted an attorney. On his advice, they filed a civil suit against the Company and Wabash for breach of the Red Book contract, claiming compensatory damages of $40,000 and punitive damages of $200,000 (Pet. App. A29). The Company demanded that the three employees withdraw their claims for punitive damages and warned that, if they did not do so within 48 hours, they would be discharged for "insubordination and extreme disloyalty." They refused to comply and were discharged (Pet. App. A30-A32).

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[2]The Administrative Law Judge did not credit the testimony of Company witnesses that Joy stated that he wanted to put the Company out of business (Pet. App. A32-A33, A37).

2. The Board, adopting the decision of its Administrative Law Judge (ALJ), found that the employees' action in filing the civil suit was protected by Section 7 of the Act and therefore the Company violated Section 8(a)(1) of the Act by discharging them for such activity (Pet. App. A39-A40, A45-A46).[3] The ALJ applied the principle enunciated in *Leviton Manufacturing Co., Inc.*, 203 NLRB 309, enforcement denied on other grounds, 486 F. 2d 686 (C.A. 1), that "the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith" (Pet. App. A18).

Thus, the ALJ concluded that the Company had not proved the filing of the suit was motivated by malice or bad faith. He found that the employees "filed their lawsuit upon the advice of their attorney based, as shown by an examination of the attendant pleadings, on an arguable legal theory" (Pet. App. A38-A39), and that, in the circumstances presented, neither their bypassing of the grievance procedure,[4] Joy's earlier desire to "shut down" the Company, the joinder of Wabash, nor the claim for punitive damages amounted to malice or bad faith (Pet. App. A36-A39).

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[3]The three employees had filed grievances concerning their discharges, and the discharges were ultimately upheld by an arbitrator who found that the employees were discharged for "just cause" (Pet. App. A2-A13). The Board refused to defer to the arbitrator's award, finding it repugnant to the policies of the Act since the arbitrator had failed to recognize "the governing principle of law" which established "the right of employees to sue their employer in a civil action" (Pet. App. A18-A19). No issue concerning the propriety of this Board holding is raised by the petition.

[4]The ALJ noted that the employees bypassed the grievance procedure because the Company's position in the previous grievances led them to believe that they could not recover by that route the back wages to which they considered themselves entitled (Pet. App. A36).

The Board ordered the Company, *inter alia*, to offer the three employees reinstatement to their former positions, and to compensate them for any loss of earnings (Pet. App. A41).

3. The court of appeals upheld the Board's decision and enforced its order. The court agreed with the Board that filing a civil damage action against the employer is concerted activity protected by Section 7 of the Act unless the employees acted in bad faith (Pet. App. A50), and it agreed that bad faith had not been shown here.

The court rejected the Company's contention that the plea for punitive damages constituted bad faith (Pet. App. A51):

> Given the barriers to recovery resulting from Trinity's 15-day limit on payments, the employees' request for punitive damages, which was filed on the advice of counsel, was based on facts arguably similar to those that other litigants in the state, and later the Indiana courts, determined to be sufficient to justify an award of punitive damages. * * * Particularly in this context, Trinity's view that the request for punitive damages by itself should prove bad faith would take away the full panoply of legal remedies given by *Leviton* in precisely the cases in which civil litigation has the most to offer in comparison with filing charges with the Board.

The court also rejected the Company's contention that the employees should have utilized the grievance procedure rather than filing suit. It noted that, given the Company's position on the grievance procedure limitations period, the employees would have had to file grievances weekly or bimonthly in order to recover the sums they considered to be due them (Pet. App. A51). The court added that, "since the lawsuit was based on a

contract between Wabash and an affiliated union (Indiana Conference of Teamsters) arguably binding Trinity as a subcontractor of Wabash," it was "essential to join Wabash to avoid the inevitable defense that a necessary party had been omitted as a defendant" (Pet. App. A51, A53). Finally, the court agreed with the Board that Joy's remarks did not evidence an intention "to injure Trinity or to destroy its relationship with Wabash," but only his "increasing irritation and frustration over Trinity's failure to pay the Red Book rates, and his desire to force [it] to pay what Joy believed was lawfully owed to him and his fellow employees" (Pet. App. A52).

ARGUMENT

The decision of the court of appeals is correct and there is no conflict among the circuits or other reason for review by this Court.

The courts of appeals that have ruled on the question have agreed with the Board that, unless filed in bad faith, a labor-related civil action by a group of employees is a concerted activity protected by Section 7 of the Act.[5]

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[5]The cases upon which petitioner relies for the assertion that there is a conflict in the circuits (Pet. 11-12, n. 9) are inapposite. None of those cases involved the filing of a civil suit. *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, involved the question whether employees who distributed to the public leaflets which disparaged the company's product and business policies and were not related to any labor dispute could be discharged for "disloyalty" to the employer. *Boeing Airplane Co.* v. *National Labor Relations Board*, 238 F. 2d 188 (C.A. 9), involved the discharge of an employee who, in his capacity as an employment agent, solicited his fellow employees to leave the company's employment and seek jobs elsewhere. *National Labor Relations Board* v. *Red Top, Inc.*, 455 F. 2d 721, 727-728 (C.A. 8), involved the discharge of employees who, because they were unhappy about a demanding supervisor, "were insolent, insubordinate and intimidating [and who] utilized false charges, threats of physical violence and threats of activity detrimental to the welfare of the business operation" (*i.e.*, involving their employer's customer, the hospital at which they worked as cleaning crew, in their dispute). *National Labor Relations Board* v. *Knuth Bros., Inc.*, 544 F. 2d 320 (C.A. 7), involved the discharge of an employee for releasing confidential information obtained in the course of his employment which damaged his employer's relationship with an important customer.

Leviton Manufacturing Co., Inc. v. *National Labor Relations Board*, 486 F. 2d 686, 689 (C.A. 1); *Altex Ready Mixed Concrete Corp.* v. *National Labor Relations Board*, 542 F. 2d 295, 297 (C.A. 5). Cf. *Socony Mobil Oil Co.* v. *National Labor Relations Board*, 357 F. 2d 662, 663-664 (C.A. 2); *Walls Manufacturing Company* v. *National Labor Relations Board*, 321 F. 2d 753 (C.A. D.C.), certiorari denied, 375 U.S. 923. The Board found, and the court below sustained its finding, that the employees here did not file the suit in bad faith, and that therefore the Company violated Section 8(a)(1) of the Act by discharging them for filing it.

Petitioner challenges the Board's conclusion on two grounds: (1) to accord the protection of Section 7 of the Act to employees who have filed suit without exhausting contract grievance procedures is contrary to the policy favoring exhaustion of those procedures (Pet. 7-10); (2) irrespective of the employees' good faith, their action in requesting, and maintaining their request for, substantial punitive damages against the Company and in joining the Company's primary customer (Wabash) in the suit, and the statement of "ringleader" Joy that he would close down the Company, established sufficient "disloyalty" to warrant the Company in discharging the employees (Pet. 10-13). There is no merit to either of these contentions.

First, even if the lawsuit here raised issues which should first have been submitted to the contractual grievance machinery, this in itself would justify only judicial abstention, not forfeiture of rights guaranteed by Section 7. The right under Section 7 to pursue a civil claim does not depend on the ultimate validity of the claim.[6] In any event, as the court below noted (p. 5, *supra*), pursuit of the grievance machinery could not be expected to secure satisfaction of the employees' claims, given the Company's interpretation of the grievance clause limitation period.

Second, petitioner's contention that the request for punitive damages amounts to disloyalty rests on the premise that this plea, if effective, would result in serious economic damage to the employer.[7] However, as the court below pointed out (p. 5, *supra*), acceptance of that argument would deprive the employees of recourse to "the full panoply of legal remedies" available to them.[8]

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[6]See *National Labor Relations Board* v. *John Langenbacher Co.*, 398 F. 2d 459, 463 (C.A. 2), certiorari denied, 393 U.S. 1049; *National Labor Relations Board* v. *Ben Pekin Corporation*, 452 F. 2d 205, 206 (C.A. 7); *National Labor Relations Board* v. *H. C. Smith Construction Co.*, 439 F. 2d 1064 (C.A. 9).

[7]Respecting the joinder of Wabash, petitioner never requested the employees to release Wabash as a defendant; their retention by the Company was conditioned solely upon withdrawal of the punitive damage claim. And the ALJ declined to credit the testimony of Company witnesses that Joy threatened to drive the Company out of business (n. 2, *supra*).

[8]As the court added, the punitive damage award arguably was authorized by state law and was filed on advice of counsel (Pet. App. A51). Contrary to petitioner's contention (Pet. 13-14), the court did not hold that action on advice of counsel protects conduct which otherwise would be unprotected. The court merely assessed that fact as one element in determining whether the employees acted in bad faith in seeking punitive damages and joining Wabash in the suit.

The cases relied upon by petitioner (n. 5, *supra*), relating to the duty of loyalty owed by employees to their employer, require no such result. Those cases stand for the proposition that the employer is entitled to demand faithful service from its employees and therefore the employees cannot use the employment relationship to disparage their employer. The employees here did not disparage their employer simply because they sought a remedy to which they reasonably believed they were entitled. Petitioner does not allege that the gravamen of the suit maligned it or misrepresented the character of the dispute. Its assertion that it would be injured financially if the employees were successful stands on no firmer footing than would an assertion that strike activity is disloyal to the employer because it injures its business.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1978.

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